Committee and submitted to the Department for approval. The members of the Committee are handlers and producers of regulated raisins. They are familiar with the Committee's needs and with the costs for goods, services, and personnel in their local area and are thus in a position to formulate an appropriate budget. The budget is formulated and discussed in public meetings, so that all directly affected persons have an opportunity to participate and provide input.

The assessment rate recommended by the Committee is derived by dividing anticipated expenses by expected acquisitions of assessable raisins—313,000 tons. That rate is applied to actual acquisitions to produce sufficient income to pay the Committee's expected expenses. The budget of expenses and rate of assessment are usually recommended by the Committee shortly after the season starts. Expenses are incurred on a continuous basis; therefore, the budget of annual expenses and assessment rate approval must be expedited so that the Committee will have funds to meet its obligations.

The Raisin Administrative Committee (Committee) met on October 10, 1991, and unanimously recommended 1991–92 expenditures in the amount of $516,735, together with a reserve for contingencies of $77,965 for a total of $594,700 and a rate of assessment of $1.90 per ton of assessable raisins acquired under the marketing order. In comparison, 1990–91 budgeted expenditures were $540,550, which included a reserve for contingencies of $37,770 and the assessment rate was $1.90. Total income for 1990–91 was $649,687, and actual expenditures were $420,874. Unexpended funds from the 1990–91 season were credited or refunded to the handlers from whom collected. Major expenditure categories for the 1991–92 crop year and actual 1990–91 expenses (in parentheses) are as follows: $212,000, ($203,808) for executive salaries; $95,000, ($75,924) for office personnel salaries; $50,000, ($27,924) for Committee travel; $40,000, ($37,892) for compliance staff salaries; and $40,000, ($32,014) for insurance and bonds.

While this action imposes some additional costs on handlers of California raisins, including small entities, the costs are in the form of uniform assessments on all handlers. Any costs to handlers are expected to be more than offset by benefits derived from the operation of the marketing order. Therefore, the Administrator of the AMS has determined that this action will not have a significant economic impact on a substantial number of small entities.

This action adds a new § 989.342 and is based on Committee recommendations and other information. A proposed rule on the authorization of expenses and establishment of an assessment rate for the 1991–92 crop year was published in the December 4, 1991, issue of the **Federal Register** [56 FR 63469]. Comments on the proposed rule were invited from interested persons until December 16, 1991. No comments were received. That proposal, incorrectly stated that the assessment rate recommended by the Committee was derived by dividing anticipated expenses by expected shipments of assessable raisins. Pursuant to § 989.80 of the order, assessments are based on acquisitions of assessable raisins. This final rule has been corrected accordingly.

After consideration of the information and recommendation submitted by the Committee and other available information, it is found that this final rule will tend to effectuate the declared policy of the Act.

This rule should be expedited because the Committee needs to have funds to pay its expenses which are incurred on a continuous basis. In addition, handlers are aware of this action, which was recommended by the Committee at a public meeting. Therefore, it is found that good cause exists for not postponing the effective date of this action until February 18, 1992 [5 U.S.C. 553].

List of Subjects in 7 CFR Part 989

Grapes, Marketing agreements, Raisins, and Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 989 is amended as follows:

PART 989—RAISINS PRODUCED FROM GRAPES GROWN IN CALIFORNIA

1. The authority citation for 7 CFR part 989 continues to read as follows:

Authority: Secs. 1–19, 48 Stat. 31, as amended; 7 U.S.C. 601–674.

2. Section 989.342 is added to read as follows:

Note: This section will not appear in the Code of Federal Regulations.

§ 989.342 Expenses and assessment rate.

Expenses of $594,700 by the Raisin Administrative Committee are authorized and an assessment rate payable by each handler in accordance with section 989.80 of $1.90 per ton of assessable raisins is established for the crop year ending July 31, 1992. Any unexpended funds from that crop year shall be credited or refunded to the handler from whom collected.

Dated: January 9, 1992.

William J. Doyle,

Associate Deputy Director, Fruit and Vegetable Division.

[FR Doc. 92–1052 Filed 1–15–92; 8:45 am]

BILLING CODE 3410-02-M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 103 and 204

[INS No. 1434–91]

RIN 1115–AC59

Employment-Based Immigrants

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Correction to rule document.

SUMMARY: This corrects errors in the final rule published on November 29, 1991, beginning at 56 FR 60897 regarding new employment-based immigrant classifications and requirements under Public Law 101–649.

EFFECTIVE DATE: November 29, 1991.

FOR FURTHER INFORMATION CONTACT: Edward H. Skerrett, Senior Immigration Examiner, Adjudications Division, Immigration and Naturalization Service, 425 I Street, NW., room 7122, Washington, DC 20536, telephone (202) 514–3946.

PART 204—PETITION TO CLASSIFY ALIEN AS IMMEDIATE RELATIVE OF A UNITED STATES CITIZEN OR AS A PREFERENCE IMMIGRANT

§ 204.6 [Corrected]

1. On page 60910, in the second column, in § 204.6(a), in the eighth line, remove the term "or by his or her authorized representative".

2. On page 60911, in the second column, in § 204.6(h)(3), in the last line, the reference "204.6(j)(3)(ii)" should read "204.6(j)(4)(ii)".

Dated: January 7, 1992.

Gene McNary,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 92–1216 Filed 1–15–92; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Ch. I

[Docket No. RM91-5-000]

Preferences at Relicensing of Units of Development; Statement of Policy

Issued December 19, 1991.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Statement of policy.

SUMMARY: The Federal Energy Regulatory Commission (Commission), on February 20, 1991, issued a Notice of Inquiry (NOI) inviting comment on a series of related questions that involve the licensing of incremental hydroelectric capacity contemporaneous with the relicensing of the unit of development in which the capacity is located. These questions encompassed the matters of whether Congress, in enacting the Electric Consumers Protection Act of 1986 (ECPA), intended to preserve either a municipal preference or a preliminary permittee's preference with respect to the development of previously undeveloped hydroelectric capacity at an existing unit of development when the incumbent licensee also seeks to develop that incremental capacity as a part of its relicensing application. Conversely, did Congress intend that the unit of development (including both developed and undeveloped capacity therein) be considered at relicensing as an indivisible unit with respect to preferences (including the incumbent's licensee's marginal preference)?

Based on the comments received in response to the NOI, the Commission is issuing a statement of policy. The policy statement concludes that the question of whether to defer consideration of applications for incremental capacity at a licensed project whose term is nearing expiration should be decided on a case-by-case basis. The policy statement sets forth a series of principles on how the Commission will resolve such issues when they arise. Briefly summarized, these principles include: (1) Applications for relicense and applications for incremental capacity, if filed within a reasonably contemporaneous time period, will be considered together in a single comprehensive proceeding; (2) the total usable capacity at the site will be determined before any of that capacity is licensed or relicensed; and (3) the applicability of the various preferences will depend on the nature of the capacity that the various applications seek in competition with each other.

EFFECTIVE DATE: December 19, 1991.

FOR FURTHER INFORMATION CONTACT: Barry Smoler, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, (202) 208-1269.

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this docket in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in room 3308 at the Commission's Headquarters, 941 North Capitol Street, NE., Washington, DC 20426.

The Commission Issuance Posting System (CIPS), an electronic bulletin board service, provides access to the texts of formal documents issued by the Commission. CIPS is available at no charge to the user and may be accessed using personal computer with a modem by dialing (202) 208-1397. To access CIPS, set your communications software to use 300, 1200 or 2400 baud, full duplex, no parity, 8 data bits, and 1 stop bit. The full text of this notice of inquiry will be available on CIPS for 30 days from the date of issuance. The complete text on diskette in WordPerfect format may also be purchased from the Commission's copy contractor, La Dorn Systems Corporation, also located in room 3308, 941 North Capitol Street, NE., Washington, DC 20426.

I. Background

On February 20, 1991, the Federal Energy Regulatory Commission (Commission) issued a Notice of Inquiry (NOI) [1] inviting comment on a series of related questions that involve the licensing of incremental hydroelectric capacity contemporaneous with the relicensing of the unit of development in which the capacity is located. These questions encompassed the matters of whether Congress, in enacting the Electric Consumers Protection Act of 1986 (ECPA),[2] intended to preserve either a municipal preference or a preliminary permittee's preference with respect to the development of previously undeveloped hydroelectric capacity at an existing licensed unit of development when the incumbent licensee also seeks to develop that incremental capacity as a part of its relicensing application. Conversely, did Congress intend that the unit of development (including both developed and undeveloped capacity therein) be considered at relicensing as an indivisible unit with respect to preferences (including the incumbent licensee's marginal preference)?

The NOI discussed the relicensing process established in ECPA, including the provisions of sections 2, 3, and 4 of ECPA with respect to preference and comprehensive consideration. The NOI also discussed the provisions of section 3 of the Federal Power Act (FPA) [3] with respect to the definitions of a "project" and "project works," and sections 5, 7, and 15 of the FPA [4] and § 4.37 and § 16.13 of the Commission's regulations [5] with respect to preliminary permits and licenses. The NOI then discussed the Court of Appeals' decision in *Kamargo Corp.* v. *Federal Energy Regulatory Commission*, 852 F.2d 1392 (D.C. Cir. 1988), and the Commission's orders in that proceeding.

Against this background, the NOI posed 12 questions on which it invited comments. Six of the questions (nos. 1-5 and 11) pertained to the role of municipal preference, incumbent relicensing preference, preliminary permittee preference, competing preferences, and comprehensive development. Generally, these questions invited comment on which preferences, if any, would pertain in particular situations, how competing preferences should be reconciled, and how to encourage comprehensive development in light of these preferences. Several other questions (nos. 6, 7, and 10) inquired about operational and economic considerations, how to define "incremental capacity," and how to allocate environmental responsibility.

Several questions (nos. 8 and 9) focused on the timing of applications to develop unused incremental capacity, whether to impose a moratorium period on such applications as the existing license approaches expiration, whether to require notification by the existing licensee of its intentions with respect to that capacity, and the consequences of such intentions. Finally, the NOI invited commenters to propose new regulations.

II. Summary of Comments

Comments were filed by nineteen commenters. Seventeen filed initial comments and five filed reply comments. The commenters and their filings are listed in appendix A. We

[1] 56 FR 8164 (Feb. 27, 1991), IV FERC Stats. & Regs. ¶ 35,522.

[2] Public Law 99-495, 100 Stat. 1243 (1986).

[3] 16 U.S.C. 796 (1988).

[4] 16 U.S.C. 798, 800, and 808 (1986).

[5] 18 CFR 4.37 and 16.13.

have carefully considered all of the comments we received.[6]

Many commenters note that the capacity at the site of an existing licensed hydropower project may be perceived differently at relicense than it was when the license was issued. Improvements in technology, for instance, may render a site capable of generating a greater amount of electric power from the same amount of water power. On the other hand, increased sensitivity to environmental concerns, or changed environmental circumstances, may reduce the usable hydropower capacity of the site. These factors might partially or wholly offset each other. These matters need to be considered before determining whether the site contains additional capacity available for development.

Most commenters agree (and none disagree) [7] that Congress, in ECPA, intended to eliminate municipal preference as a basis for transferring existing licensed project facilities from one licensee to another if there are no significant differences between the applicants' competing proposals at relicense. Many commenters characterize this as Congress' prime motivation in enacting ECPA. The commenters differ, however, on the conclusions they draw from this premise with respect to undeveloped capacity at a project site at relicense.

Several commenters [8] contend that Congress intended its preclusion of municipal preference at relicensing to apply only to the existing developed capacity of the site. These commenters contend that the development of previously undeveloped capacity at the site should be treated as "original" licensing, for which Congress preserved the municipal preference. As articulated by Public Power, "(i)ncremental development is not a transfer of an existing right. It is development of a previously undeveloped water resource," [9] such that municipal and preliminary permittee preferences would apply. Puerto Rico contends that ECPA preserved municipal preference for undeveloped incremental capacity as a separate unit of development that is not subject to the existing licensee's marginal preference.[10]

Public Systems contends that there is no conflict between municipal and permittee preference, on the one hand, and the existing licensee's marginal preference, on the other hand, because the undeveloped incremental capacity does not fall within the scope of the relicensing process; thus, there is no marginal preference for this capacity. Colorado contends that the undeveloped incremental capacity is subject to both a preliminary permittee preference and an existing licensee's marginal preference, and that if both preferences are invoked the marginal preference prevails over the permittee preference.

Public Systems also suggests a regulatory scheme whereby incremental capacity could be licensed as original licensing during the term of an existing license, but subject to transfer and compensation at relicensing. Public Systems also proposes a window of opportunity to apply for preliminary permits to develop incremental capacity that interferes with existing licenses, the window to be a period near the expiration of the existing license.[11]

Starting from the same premise that Congress, in ECPA, intended to eliminate municipal preference as a tie-breaking factor at relicensing, that could result in the transfer of facilities, many commenters [12] reach quite different conclusions on the role of preferences with respect to previously undeveloped capacity. Citing sections 10(a) and 15 of the FPA as amended by ECPA, these commenters note that Congress intended the relicense process to be a competitive proceeding to determine which proposal is "best adapted to a comprehensive plan for improving or developing a waterway or waterways." [13]

Discussing the legislative history of ECPA, EEI stresses that ECPA added various factors to consider at relicense, but did not alter or eliminate the best adapted/comprehensive standard in section 10(a)(1) of the FPA. Quoting from that legislative history, NHA stresses Congressional concern with "optimal development" of hydropower sites, while Alabama, Idaho, and the Incumbents stress that the relicense applicant and the Commission have an obligation to consider improvements in facilities, efficiency, and capacity that might better utilize the potential of the waterway. These and other commenters argue that "piecemeal" licensing of different projects at a hydropower site would be inconsistent with the intent of Congress in enacting ECPA because it would undermine the Congressional purpose of fostering comprehensive development and coordinated planning.

From this perspective, these commenters argue that the existing licensee's marginal preference applies to the hydropower site as a coherent entity, and not just to the particular facilities that were previously licensed. PG&E, for instance, contends that the best-adapted approach at a particular site might be to reconstruct or replace the existing facilities, and that Congress could not have intended to discourage such modernization by according the marginal preference solely to the relicensing of the existing obsolete facilities. These commenters argue that according a municipal or preliminary permittee preference to portions of the hydropower capacity at a site at relicensing would be inconsistent with the Congressional purpose of ECPA, because it "would diminish the

[6] Several of the initial comments were filed slightly past the comment deadline, but in a manner that did not delay or disrupt the proceeding or prejudice any other commenter. All comments received were accepted and considered.

[7] Question nos. 1, 2, 3, 4, 5, and 11 of the NOI posed closely related issues that most of the commenters addressed in a comprehensive narrative rather than question by question. Accordingly, the comments in response to these six questions are summarized collectively, in the same manner as the comments themselves.

[8] *E.g.*, Public Power, Public Systems, and Puerto Rico.

[9] Comments of Public Power at 3.

[10] We note at the outset several comments over nomenclature. First, NHA and Public Systems point out that the phrase "marginal preference," with reference to existing licensees' seeking relicense, does not appear in ECPA. Instead, section 15(a) of the FPA, as amended by ECPA, provides that "insignificant differences" in applications shall not result in transfer of a project from the existing licensee to a competing applicant. The phrase "marginal incumbent preference" was used by the Court of Appeals in *Kamargo* (852 F.2d at 1394) as a short convenient characterization of the statutory provisions in section 15(a), and we will also use it in that spirit.

Public Systems prefers the phrase "public preference" instead of "municipal preference," because section 7 of the FPA accords the preference to states as well as municipalities, and municipalities are in any event political subdivisions of states. We agree that the commonly used phrase "municipal preference" encompasses both states and municipalities.

[11] NHA and EEI propose that applications for preliminary permits be required to include sufficient information to disclose whether the applicant's contemplated project would interfere with an existing license project within the meaning of section 6 of the FPA, which precludes such interference, absent consent of the licensee, during the term of the license. Public Systems opposes the proposal. We are not inclined to propose such a regulation. Our experience has been that existing licensees have readily recognized such potential for interference and have readily brought it to our attention in intervening pleadings. To the extent that it is possible for a permittee to design its project in such a manner as to avoid interfering with an existing licensed project, the permit affords the permittee an opportunity to conduct appropriate studies along those lines.

[12] *E.g.*, EEI, NHA, Incumbents, Alabama, Duke, Georgia, Idaho, Long Lake, PG&E, and Portland.

[13] Section 10(a)(1). Section 15(a)(2) provides that any new license be issued to the applicant whose proposal is "best adapted to serve the public interest."

Commission's ability to adopt the plan best suited to comprehensive development of the resource," [14] and would allow municipal preference to "slip through the back door." Duke provides another perspective: [15]

> The rationale for the inescapable conclusion that undeveloped capacity should be the subject of relicensing is that if a licensee fails to propose a comprehensive development at its relicensed project, and a competitor does make such a proposal, the competitor can overcome the marginal incumbent preference. The threat of such an outcome ensures that all incumbent licensees will redevelop their projects fully at relicense or will suffer the consequences. Such an approach fosters "equal consideration" under ECPA.

Some commenters suggest that the scope of the various preferences may depend on the factual context presented. Georgia and New York, for instance, would treat the undeveloped incremental capacity at a site as "new" licensing (relicensing), subject to the existing licensee's marginal preference, if the existing licensee proposes to develop that capacity as part of its relicense application, but would treat it as original licensing (with municipal and permittee preference applying) if the licensee does not propose to develop it. Alabama proposes that any third-party license application to develop incremental capacity that is filed within five years of the expiration of the existing license be treated as a competitive application at relicense, without a permittee preference even if the third party had prepared the application pursuant to a preliminary permit.

As discussed below, various commenters propose requirements whereby the existing licensee would have to file notice of its intent to include the incremental capacity in its relicense application in order for the existing licensee marginal preference to extend to that incremental capacity. Some commenters would impose moratoria on either permit or license applications during some specified period near the expiration of the existing license, while other commenters would allow such applications to be filed but would not accord them municipal or permittee preference.

The NOI invited comment on whether there are any operational or economic efficiencies associated with developing incremental capacity. Some commenters [16] express the view that this determination is best made on a case-by-case basis, on the facts presented. Duke and the Incumbents note that multiple operators may well have differing cost constraints at which they can operate their facilities economically.

A number of commenters [17] identify potential problems and inefficiencies associated with multiple management of hydropower facilities located at the same site. The most serious potential problems mentioned are how to allocate available water resources during periods of lessened flows, how to coordinate operating modes (*e.g.*, baseline or peaking) and electric generation, and how to coordinate responsibilities for safety and environmental protection.

EEI and Colorado suggest that multiple projects at the same site could result in uneconomic duplication of operation and maintenance personnel, and of control and relay, transmission, and interconnection facilities. Idaho suggests that common project works and coordinated electric generation could result in greater economic efficiency. New York comments that "(t)he development of incremental capacity may alter the optimum scheduling of facilities at a unit of development." [18]

Idaho suggests that the management of available water power, particularly during periods of low flows, could be a problem unless the incremental project is subordinated to the existing project. Georgia suggests that multiple project operators could appoint a single licensee as their "agent" for the entire site for the purpose of ensuring environmental protection, public access, and dam safety. Georgia also suggests that integrated dispatch by a single project operator at a site would be more efficient and economic, particularly on the hydro storage projects that are common in its region of the country.

Generally, the commenters do not appear to regard any of the problems or inefficiencies to be insurmountable. On the other hand, none of the commenters appears to suggest any advantages to having multiple operators at the same site other than the advantage of fully developing the available capacity.

The NOI invited the commenters to define "incremental capacity." Idaho suggests that capacity can be defined either in terms of "hydraulic capacity" (input) or "electric capacity" (output), and suggests that hydraulic capacity is more appropriate because it is the overriding constraint on the development of a hydropower site. Other commenters offer the following definitions:

> "Any proposal that would utilize all or any part of the head or flow (whether or not currently utilized) on a reach of river on which a licensed project is located." [19]

> "New capacity possible from the use of additional water flows not utilized by the existing licensee." [20]

> "Any capacity beyond that supported by recorded flows showing the available hydraulic capacity at a given unit." [21]

> "If licensed capacity is being reasonably efficiently utilized, only hydraulic capacity in excess of that specified in the incumbent licensee's license." [22]

> "All flows that can be met beyond the 'full load' of existing units to the extent those flows do not violate existing license provisions." [23]

> "Additional new capacity that can be installed without affecting existing operations or existing use of the streamflow." [24]

The NOI invited comment on whether there should be a deadline by which an existing licensee would be required to notify the Commission of its intent to seek (or not seek) license authority to develop the unused incremental capacity at a unit of development whose license is approaching expiration. The NOI also invited comment on whether the Commission should establish a moratorium period, towards the expiration of an existing license, during which the Commission would decline to consider applications for preliminary permits and original licenses to develop only the incremental capacity of a unit of development. Many commenters responded to these two questions separately, while others discussed the matters of notices and moratoria together, as related facets of a broader issue.

New York proposes a detailed set of deadlines and procedures with respect to notices of intent. Summarized briefly, New York would require an existing licensee to file a notice of its intention to "consider developing" the incremental capacity at a site, the notice to be filed within 90 days of the issuance by the

[14] Comments of Portland at 4.

[15] Comments of Duke at 15.

[16] *E.g.*, NHA, Incumbents, Duke, and Puerto Rico.

[17] EEI, Incumbents, Public Pool, New York, Colorado, Duke, Georgia, Idaho, and Montana.

[18] Comments of New York at 7.

[19] Comments of EEI at 33. EEI suggests this definition in the context of its proposal for a moratorium period.

[20] Comments of Public Systems at 20.

[21] Comments of Puerto Rico at 2.

[22] Comments of New York at 9. New York suggests this definition in the context of a procedural proposal that would provide deadlines by which an existing licensee would have to announce its intentions to develop the incremental capacity, prepare a proposal, and construct the facilities, or lose its existing licensee marginal preference with respect to that capacity.

[23] Comments of Long Lake at 5.

[24] Comments of Georgia at 9.

Commission of notice of an application by a third party for a preliminary permit to develop that capacity. If the existing licensee files such a notice of intent to consider developing incremental capacity, it would then have to flesh out the details of its proposal within three years, or in its relicense application, whichever first occurred. Absent such notice and development of a proposal, the third party would have a valid preliminary permittee preference (if it had sought and obtained a permit) with respect to the incremental capacity, and the existing licensee would "forfeit" its marginal preference with respect to that capacity.

In its reply comments, Niagara opposes New York's proposal, contending that proposals to develop incremental capacity should be considered at relicensing, in a comprehensive proceeding, unencumbered by permittee preference. Niagara objects to any procedures that would enable third parties to accelerate consideration of the incremental capacity outside the context of the relicense proceeding.

In a related proposal, New York recommends that, five years prior to expiration of the existing license, the existing licensee should be required "to declare its intention to evaluate the possibility of developing additional capacity." [25]

Georgia suggests that the existing licensee could be required to indicate its intent to develop (or not develop) the incremental capacity by filing a notice of that intent in response to a third party's application for a preliminary permit to develop that incremental capacity. Idaho would not require such a notice, but suggests that the existing licensee could protect its rights by filing such a notice voluntarily.

Many commenters [26] oppose imposition of a requirement on existing licensees to file a notice of intent to develop incremental capacity, and regard it as unnecessary. Puerto Rico's conclusion is based on its contention that the incremental capacity constitutes a separate unit of development.

Duke and the Incumbents contend that the same notice requirements should apply equally to all participants in the licensing process, and that there is no requirement on third-party applicants to announce their intentions by a prescribed deadline. EEI makes the same point, observing that the Commission, in its rulemaking proceeding on the relicensing regulations, declined to require competitors to file notices of intent.[27]

EEI argues that there is no need to require licensees to file a notice of intent to develop incremental capacity, because, if the existing licensee does not include such capacity in its application for relicense, and if a competing applicant for the project does not include that capacity, the competing applicant may well prevail in taking over the project. EEI points out that ECPA established a procedure in FPA section 15 whereby applications for new licenses for existing projects must be filed no later than two years prior to the expiration of that project's original license, with the competing applicants having a right to file final amendments thereafter.[28] EEI also points out that the purpose of the elaborate consultation process at relicensing is to enable applicants (including existing licensees) to prepare their best proposal (including proposals to develop incremental capacity). Thus, EEI argues that, if an existing licensee applicant is precluded from filing an application (or amendment thereto) for relicense that includes incremental capacity unless it had given prior notice of such intent, the notice requirement would violate the licensee's right of final amendment under ECPA, and would render the pre-filing consultation process meaningless. If the absence of a notice would not have this effect, then the notice requirement would serve no purpose.

Ten commenters [29] advocate establishment of some form of moratorium on either the filing or processing of preliminary permit or license applications for incremental capacity, while four commenters [30] oppose the concept. The moratoria proposed range from two to ten years prior to the expiration of the existing license, and with varying modes of operation.

EEI proposes a ten-year moratorium [31] during which preliminary permit applications would not be accepted and license applications [32] would be deferred for consideration in conjunction with the related relicense applications.[33] EEI bases its selection of ten years on its estimate that preparation of a relicense application, including initial evaluation, planning, and consultation, takes eight to ten years. If license applications for incremental capacity are filed more than ten years prior to the existing license's expiration, EEI would have the application processed to decision, but would have the term of the incremental capacity license expire on the same date that the term of the existing license expires.

NHA prefers a three-year moratorium on permit applications, with no moratorium on license applications. If a license application is filed less than five years prior to expiration of the existing license (the deadline for the existing licensee to file notice of its intent to seek relicense), then NHA would consider such an application contemporaneously with the relicense applications. If a license application is filed more than five years in advance of expiration, NHA advocates considering and reaching a decision on that application prior to considering the relicense applications.

Georgia proposes a six- or seven-year moratorium. During that period, applications could be filed for both permits and licenses, and the existing licensee could be required to respond to such applications by indicating whether it intended to include the incremental capacity in its relicense application. If the existing licensee filed a notice of such intent, then the third-party application would be deferred for consideration in a comprehensive relicensing proceeding. If the existing licensee did not file such a responsive notice of intent, then the incremental capacity license application would be processed as an original licensing proceeding. License applications filed pursuant to preliminary permits would be accorded a preliminary permittee preference against other third-party license applications for the same incremental capacity, but would not be accorded permittee preference vis-a-vis the existing licensee if the existing

[25] Comments of New York at 10.

[26] EEI, NHA, Public Systems, Incumbents, Puerto Rico, Duke, and Idaho.

[27] *See* Hydroelectric Relicensing Regulations Under the Federal Power Act, Order No. 513, FERC Stats. & Regs. (Regulations Preambles) ¶ 30,854 at pp. 31,415–16.

[28] *See* FPA section 15(c)(1), 16 U.S.C. 808(c)(1) (1988).

[29] EEI, NHA, Incumbents, New York, Alabama, Duke, Georgia, Montana, PG&E, and Public Systems.

[30] Puerto Rico, Idaho, Long Lake, and Public Systems. (Public Systems is included in the lists of both proponents and opponents because it substantially opposes the concept but with one exception.)

[31] As discussed herein, all proposed moratoria are measured in terms of years prior to the expiration of the existing project's license.

[32] For purposes of this discussion of proposed moratoria, all references herein to "preliminary permit applications" and "license applications" mean applications to develop only the incremental capacity at the site of an existing licensed project.

[33] EEI would allow the processing of incremental capacity license applications to the extent of correcting deficiencies, but not to the point of substantive analysis and decision.

licensee had filed, in response to the permit application, a notice of intent to develop that incremental capacity as part of its relicense application.

Alabama recommends that any license application filed within five years prior to expiration be treated as part of the relicense process even if the application was prepared pursuant to a preliminary permit issued more than five years prior to that date. Otherwise, Alabama contends, permittee preference for the incremental capacity might enable the permittee to bootstrap itself into taking over the entire project.

New York proposes a five-year moratorium on license applications if the existing licensee has given notice of "its intention to consider development" of the incremental capacity sought. Applications filed more than five years prior to expiration of the existing license would be permitted, but subject to the existing licensee's ability to challenge the application within 90 days (see discussion above of New York's proposed scheme).

PG&E proposed a moratorium period of ten years, based on its own experience in how long it takes to prepare a relicense application, including preliminary studies. PG&E suggests that the time needed can vary, depending on the age of the facilities and the environmental sensitivity of the site. Montana recommends a seven-year moratorium, based on its own experience in preparing applications. Duke and the incumbents recommend a five-year moratorium.

Public Systems recommends a two-year moratorium, but only if the existing licensee has filed a relicense application that includes development of the incremental capacity. Otherwise, Public Systems generally opposes the concept of imposing any specified moratorium, contending that these decisions are best made on a case-by-case basis.

Puerto Rico and Idaho contend that there is no need for a moratorium. Puerto Rico's position is based on its view that the incremental capacity constitutes a separate unit of development. Idaho's position is premised on its view that preliminary permittee preference would not apply if the existing licensee had filed a notice of intent, in response to a preliminary permit application for incremental capacity, that the existing licensee's relicense application would include development of the incremental capacity sought by the permittee.

Long Lake opposes any imposition of either a notice of intent requirement or a moratorium, contending that any such requirement would constitute a "creeping preference" for existing licensees, in violation of the legislative intent of Congress in enacting ECPA.

The NOI also invited comment on how management responsibilities (and costs) for environmental mitigation measures should be allocated among multiple projects operated at the same hydropower site. NHA, EEI, and Public Systems recommend making the allocation on a case-by-case basis, in light of the facts presented. Colorado, Duke, and the Incumbents contend that the question itself illustrates the complexities inherent in splitting units of development and their operation, and that Congress did not intend to divide these responsibilities. They note the difficulty, for instance, in allocating water to different projects at the same site while maintaining minimum flows for environmental (*e.g.*, fishery resource or recreational) purposes, and contend that it highlights the importance of assessing environmental impact at a site in a comprehensive proceeding.

Other commenters propose formulae and factors to consider. New York, for instance, suggests that the cost of the operation and maintenance of joint facilities, including recreational facilities and fish ladders, etc., should be shared in proportion to electrical output. If the joint facilities are owned by one operator, the other should reimburse it in the same manner as headwater benefits are reimbursed. Long Lake recommends that environmental costs be allocated in proportion to the anticipated output of the respective projects.

Georgia suggests that the allocation of environmental costs be based on the level of mitigation required by the development of the incremental capacity. Idaho proposes a series of factors to consider, including the environmental impacts, mitigation measures, and costs for both the existing project and the incremental capacity project, as well as the effect of each project on the other in meeting their respective requirements. Idaho would then allocate to the incremental capacity project the costs of environmental mitigation caused by the development of the incremental capacity, including any increase in costs incurred by the existing licensee, plus a share of the costs common to both projects.

The NOI invited comment on whether the Commission should propose new regulations. Eight commenters [34] favor issuance of new regulations, while another eight commenters [35] oppose such issuance.

NHA proposes adoption of new regulations to define the contents of preliminary permit applications with respect to facts on interference with existing projects, and to provide a moratorium on preliminary permit applications within three years of the expiration of an existing license.[36] EEI proposes regulations to establish a ten-year moratorium period prior to license expiration during which incremental capacity license applications would be deferred and preliminary permit applications would not be accepted.

New York proposes regulations to specify the detailed requirements it suggests on the filing by existing licensees of declarations of intent to develop unused capacity. Idaho proposes regulations clarifying that a preliminary permit won't be issued to a third party for development of incremental capacity if the existing licensee has filed, in the permit proceeding, a notice of intent to include development of that capacity in its relicense application. Alabama proposes regulations to define incremental capacity, to establish a deadline for existing licensees to give notice of their intent to develop incremental capacity, and to establish a five-year moratorium on processing third-party applications to develop incremental capacity.

Puerto Rico proposes that the regulations be revised to provide a more precise definition of "unit of development," but does not propose a specific definition. Colorado believes that new regulations would expedite the licensing and relicensing processes by clarifying the preference issues, and Portland also favors new regulations, but neither proposes specific provisions.

Commenters opposing new regulations give a variety of reasons. They contend that the requirements of ECPA are clear, that the present regulations are adequate, that new regulations are unnecessary and could disrupt on-going relicense processes, that the Commission's hydropower regulations are already complicated and should not be further expanded, and that the issues posed by the NOI are fact-specific, such that they are better resolved through case-by-case determinations than by generic rules. Public Systems prefers Commission

[34] EEI, NHA, New York, Puerto Rico, Alabama, Colorado, Idaho, and Portland. EEI submitted draft regulatory text.

[35] Public Power, Public Pool, Public Systems, Incumbents, Duke, Georgia, Washington, and Long Lake.

[36] NHA's third proposal, not discussed herein, is beyond the scope of the NOI.

issuance of a policy statement or guidelines rather than new regulations. Public Pool "believes that trying to create a one-size-fits-all rule out of the factual context of these cases would be a serious mistake," and that "(i)t would saddle the Commission with an inflexible, maybe even unworkable, set of requirements for application in very different sets of circumstances."

Finally, several of the commenters suggest that the issues raised in the NOI are, in effect, a tail that should not be permitted to wag the dog. NHA, for instance, comments that "(t)he complexity of the issues is surpassed only by the infrequency with which they arise." [37] Duke and the Incumbents suggest that "(t)he existence of a small class of very troublesome cases, like those presented in the NOI, does not provide the justification for creating new regulations that will unduly complicate not only every licensing and relicensing, but the day-to-day operations of every hydro project as well." [38]

III. Statement of Policy

The comments have been very helpful to us in clarifying the issues, and in putting them into their proper prospective in the broader context of the relicensing process. In light of our own experience to date, we are persuaded by the commenters that the issues that arose in the *Kamargo* proceeding are unlikely to arise in a broad spectrum of relicensing proceedings, and are better addressed on a case-by-case basis when they arise rather than by generic rule. Thus, we have determined not to propose any new regulations at this time.

Despite the diversity of opinion expressed in the comments, we perceive several common central principles upon which most of the commenters seem to agree. We set these forth below as a statement of policy on how we currently intend to proceed in the processing of permit and license applications for incremental capacity. These principles are broadly stated, and are intended as an overall framework. The precise scope and implementation of these principles will be determined on a case-by-case basis in the context of the facts presented by the applications that come before us, and may be refined or modified based on our experience in implementing them.

1. If within a reasonably contemporaneous time period the Commission has (or reasonably expects to have) before it for consideration: (a) An application for relicense of existing facilities; [39] and (b) an application for a license for incremental capacity at the same site; [40] then the Commission will consider the applications in a comparative proceeding.[41] This will enable the Commission to consider the widest range of potential alternative uses for the site, including comprehensive reconstruction or replacement of facilities that would be best adapted to the site as a whole.

We prefer at this juncture not to define "contemporaneous" by a rigid rule. We note, however, that applications for license authority require a number of years to prepare and process, including long lead time for planning and consultation. Thus, in the context of the processing of hydropower applications, contemporaneity is necessarily measured in terms of a period of years and must necessarily include anticipated applications for relicense as well as applications already on file. This does not require a moratorium precluding the filing of applications, but may well entail deferral of consideration of such applications pending comparative and comprehensive review at relicensing. The appropriate length of such a deferral period may well vary, depending on the size, nature, and age of the existing or potential project works at the site, and safety or environmental concerns peculiar to that site. We believe that these factors ought to be considered on a case-by-case basis.

2. In the comparative proceeding, the Commission will determine the total usable capacity of the site in light of modern technology and contemporary environmental considerations. We recognize that this analysis may result in a determination of either greater capacity (due, *e.g.*, to technological improvements) or less capacity (due, *e.g.*, to contemporary environmental considerations) than was previously licensed. We believe that licenses at relicensing should be based on a current comprehensive analysis of the entire site.

3. In the comparative proceeding, the Commission will ascertain whether any applicant (either the existing licensee or a third party competitor, or both) has applied for a license that would develop all of the available capacity at a site,[42] and if the project(s) proposed in such application(s) would be economically viable. Pursuant to the statutory standards of "comprehensive development" and "best adapted," an economically viable proposal by a third party who proposes to develop all of the available capacity at the site [43] may well prevail over the existing licensee's marginal preference for relicensing of the existing facilities; if the third party's full capacity proposal is significantly different from the superior to the existing licensee's proposal, no tie will occur, and there will be no occasion to consider the existing licensee's marginal preference. Municipal preference and permittee preference will not apply in this situation, which would constitute "new" licensing rather than "original" licensing.

4. If the existing licensee has applied for a new license (either to operate the existing project without change or for a project that develops more or all of the available capacity at the site), the existing licensee's marginal preference would pertain, and a third-party competitor would not have either a permittee or municipal preference vis-a-vis the existing licensee. Thus, in the event that there were no significant differences between the existing licensee's proposal and the third-party applicant's proposal, the "tie" would be resolved by the existing licensee's marginal preference. For example, the existing licensee's marginal preference *will* apply, and the third-party's municipal or permittee preference will *not* apply, in: (a) A contest in which the existing licensee and the third party both propose to operate the existing project without change; and (b) A contest in which the existing licensee and the third party both propose to develop all of the available capacity at the site (*i.e.*, the existing capacity plus

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[37] Comments of NHA at 4.

[38] Comments of Duke at 29; comments of Incumbents at 22 (the quote is identical in both comments). In this regard, we note that all of the cases in which the *Kamargo*-type issues have arisen involve hydropower sites in only one state.

[39] The application could also be for expansion, improvement or replacement of existing facilities.

[40] The NOI focused on the "unit of development" concept embedded in section 3 of the FPA. Most of the commenters framed their comments in terms of hydroelectric facilities at a "site" rather than at a unit of development, and we have adopted this terminology for our discussion herein. What constitutes the parameters of a "site" is an inherently fact-bound determination that will be made on a case-by-case basis.

[41] There are also other situations (not relevant to the issues discussed in this NOI proceeding) in which the Commission will consider license applications in a comparative proceeding.

[42] As used in this discussion, the phrase "all of the available capacity at the site" means all of the capacity at the site that can be developed for hydropower purposes consistent with appropriate environmental mitigation and applicable standards of comprehensive development and best adapted use of the water resources at the site

[43] *Id.*

the incremental capacity) as improved versions of the existing project.[44]

5. If no applicant has applied for a license that would utilize all of the available capacity at the site, and if the existing licensee has applied for relicense of the existing facilities, and if a third party has applied for a license to develop the incremental capacity and the two proposed projects can be operated compatibly with each other,[45] then both licenses could be issued.[46] Under these circumstances, the license for the existing facilities would be a "new" license (relicense), and the license to develop the incremental capacity would be an "original" license. If more than one applicant seeks a license to develop the incremental capacity (and for *only* the incremental capacity), permittee preference and municipal preference would apply. If a third-party applicant seeks to take over the existing facilities, and *only* the existing facilities, the existing licensee would have a marginal preference, and there would be no permittee or municipal preference for these facilities.[47]

Our determinations above are based on our understanding of the fundamental thrust of the FPA as amended by ECPA. Section 15(a)(2) of the FPA [48] provides that "(a)ny new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest * * *." [49] Section 10(a)(1) of the FPA requires that "the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways * * *." [50]

Sections 4(e) and 10(a) of the FPA,[51] as amended by section 3 of ECPA, enumerate a broad range of factors that the Commission must consider, including protection, mitigation of damage to, and enhancement of, fish and wildlife resources; energy conservation; protection of recreational opportunities; and irrigation, flood control and water supply; as well as development of water power. The clear thrust and purpose of these statutory provisions is that Congress intended that the Commission, at relicensing, take a close, hard look—a "comprehensive" look—at the hydroelectric project site, and determine which project or projects would be most appropriate for that site in light of all of the relevant considerations.

In section 2 of ECPA, Congress amended section 7(a) of the FPA [52] in such a manner as to make the preference for states and municipalities inapplicable to the issuance of new licenses in the relicensing of existing projects. In section 4 of ECPA, Congress amended section 15 of the FPA to ensure that, in the relicensing process, "insignificant differences" between applications "are not determinative and shall not result in the transfer of a project." As discussed above, this provision has been judicially characterized as establishing a "marginal preference" for the incumbent licensee seeking relicense of an existing project.

To be sure, Congress did not focus explicitly on the appropriate treatment of unused available capacity at an existing site, but the clear thrust of the legislation is that the Commission take its close, hard look at the site as a comprehensive entity. There is no indication that Congress intended the existing licensee's marginal preference to relicensing, or the restriction on municipal preference at relicensing, to apply to anything less than the full site of the project whose relicense is at issue. We do not believe, for instance, that Congress intended the existing licensee's marginal preference to apply solely to the existing facilities, however outmoded or inefficient they might be, but not to apply to proposed improvements or replacements of those facilities, including more modern or efficient project works that would develop unused capacity or better protect the environment. Nor do we believe that Congress intended to accord a municipal or permittee preference to proposals that would improve some isolated portion of the project site at a potential cost of frustrating the comprehensive redevelopment of the site at relicensing.[53]

Accordingly, we conclude that Congress intended the "best adapted" and "comprehensive plan" standards to apply to the site as a comprehensive unit at relicensing, and did not intend to accord municipal or permittee preference to applications to develop any particular portion of the site. It follows from this that all reasonably contemporaneous applications to develop or operate hydroelectric facilities at the site must be considered jointly, in a comprehensive proceeding at relicensing that includes a determination of the actual capacity of the site in light of modern technology and current understanding and sensitivity to environmental values. Within that context we can evaluate the proposals to operate existing facilities or

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[44] We also note the possibility of a contest in which the existing licensee proposes to operate the existing project, and the third party proposes to develop all of the available capacity (existing plus incremental) as an improved version of the existing project, under circumstances in which the choice between the two proposals is very close. For instance, there could be a choice between a proposed project that would generate more power and a proposed project that would better protect the environment. Under those circumstances, there would clearly be significant differences between the two proposals, such that the "marginal preference" described by the Court of Appeals as arising out of ECPA would not pertain. The Commission would reach its determination based on the merits of the facts presented. In any event, third-party municipal or permittee preference would not apply, because the choice would be made in a comparative proceeding at relicensing.

[45] Section 6 of the FPA doesn't apply to this situation because the original license has expired. The test, therefore, is comprehensive development of the available water resources, not physical interference with existing facilities.

[46] In that situation, the Commission's practice has been to issue the two licenses at the site for the same term, to expire simultaneously. In the future the Commission will consider such circumstances on a case-by-case basis.

[47] We also recognize the possibility of a contest in which the existing licensee proposes to operate the existing project, and the third party proposes to develop only the unused capacity, but under circumstances in which the two proposed projects cannot be operated compatibly at the same site. In that event, the Commission would select the existing licensee's proposal for relicensing of its existing project. There would be no municipal or permittee preference because the choice would be made in a comparative proceeding at relicensing.

[48] 16 U.S.C. 808(a)(2) (1988).

[49] 16 U.S.C. 808(a)(2) (1988).

[50] 16 U.S.C. 803(a)(1) (1988). In its entirety, it reads as follows:

(a)(1) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e). If necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

[51] 16 U.S.C. 797(e) and 800(a) (1988).

[52] 16 U.S.C. 800(a) (1988).

[53] In this regard, we agree with NHA (comments at 13–14) that Montana Power Co. v. Federal Power Commission, 298 F.2d 335 (D.C. Cir. 1962), does not require that proposals to develop unused capacity at a site be treated as original licensing. That case involved a determination of headwater benefits, and predated the enactment of ECPA. The court construed the FPA as authorizing separate licensing (as opposed to amending the extant license) of additional project works at a unit of development. The court's reasoning, however, does not preclude the comprehensive analysis at relicensing that is mandated by ECPA, nor does it preclude licensing of the best adapted proposal(s) that emerge in the relicensing process.

to develop new facilities, and select the best adapted proposal(s).[54]

We regard the matter of a moratorium on applications to be a very close question. On balance, we have concluded that our purposes can best be achieved on a case-by-case basis. If a third party files an application (for either a preliminary permit or a license) to develop unused capacity at the site of an existing licensed project, the licensee can file a motion to intervene stating its reasons why the application should be considered in a comprehensive proceeding at relicensing. We can then consider the matter on the facts presented.

If an application for a license is for unused incremental capacity, and if it is filed at a time when an existing license for a project at the same site is approaching expiration, the Commission will determine on a case-by-case basis whether to defer consideration of the application to a comparative proceeding at relicense. If deferring the license application would result in that application becoming stale or obsolete, we may dismiss the application without prejudice to refiling it in the relicense proceeding.

In light of our determinations above on permittee preference, we will not impose a moratorium on preliminary permit applications. The permit would afford the permittee a tie-breaking preference over other third-party applicants for the incremental capacity, but not against any comprehensive proposals (either by the existing licensee or by a third party applicant) at relicensing to develop all of the capacity at the site.[55] If permit applicants are willing to incur the risks inherent in this framework, it does not appear necessary to preclude them from obtaining a permit and developing an application for a license.

As long as related license applications are considered together in comprehensive proceedings at relicense, and as long as preferences are accorded only in situations where such preferences are appropriate, we perceive no harm to existing licensees in allowing third-party incremental capacity applicants to file an application for a license, and to both file for and receive a preliminary permit. These filings put the existing licensee on notice of the third party's intentions, and may thereby assist the existing licensee in preparing its relicense application. These filing would also serve to alert the Commission as to the views of various interested persons as to the potential capacity at the site.

By the Commission.

Lois D. Cashell,

Secretary.

Appendix A

List of Commenters

1. Alabama Power Company (Alabama).
2. American Public Power Association (Public Power).
3. Duke Power Company (Duke).
4. Edison Electric Institute (EEI).
5. Georgia Power Company (Georgia).
6. Idaho Power Company.
7. Incumbent Licensee Group (Incumbents).[56]
8. Long Lake Energy Corporation (Long Lake).
9. Montana Power Company (Montana).
10. National Hydropower Association (NHA).
11. Niagara Mohawk Power Corporation (Niagara).
12. Pacific Gas and Electric Company (PG&E).
13. Portland General Electric Company (Portland).
14. Public Generating Pool (Public Pool).
15. Public Service Company of Colorado (Colorado).
16. Public Systems.[57]
17. Puerto Rico Electric Power Authority (Puerto Rico).
18. State of New York Department of Public Service (New York).
19. Washington Water Power (Washington).

Reply comments were filed by EEI, Niagara, Public Systems, Public Pool, and Georgia. All of the commenters listed above filed initial comments except Niagara Mohawk and Public Pool.

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[54] As described herein, there will be a sequence of inquiries in the Commission's analysis of the proposals, but these steps are intended to culminate in a single order.

[55] The preliminary permit, when issued, would contain appropriate conditions defining the scope of the preference accorded therein, and whether that determination is deferred to a subsequent proceeding.

[56] Incumbents is comprised of Georgia Pacific Corporation, Lockhart Power Company, Milliken and Company, Elkem Metals Company, Topoco, Inc., and Yadkin, Inc.

[57] Public Systems is comprised of the Northern California Power Agency; the Electric Department of Burlington, Vermont; the Holyoke, Massachusetts Gas & Electric Department; and the Cities of Azusa, Colton and Riverside, California.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8389]

RIN 1545-AP72

Taxation of Fringe Benefits and Exclusions From Gross Income of Certain Fringe Benefits

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final amendments of two provisions of the fringe benefit regulations concerning the taxation and valuation of fringe benefits and exclusion from gross income for certain fringe benefits. The final amendments affect any person providing or receiving these fringe benefits and provide these persons with the guidance necessary to comply with the law.

EFFECTIVE DATE: The final amendments to the fringe benefit regulations are effective July 1, 1991.

FOR FURTHER INFORMATION CONTACT: Marianna Dyson at 202-377-9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 20, 1991, a notice of proposed rulemaking was published in the **Federal Register** (56 FR 23038). The notice contains proposed amendments to the fringe benefit regulations under sections 61 and 132 of the Internal Revenue Code of 1986 (Code). These proposed amendments provide guidance on the tax treatment of certain transportation provided by an employer to or from an employee's workplace due to unsafe conditions surrounding the employee's workplace or residence and increase the dollar amount of the de minimis exclusion for public transit passes provided to employees for commuting on public transit systems.

Comments were received from the public, and on July 1, 1991, the Internal Revenue Service held a public hearing concerning the proposed amendments. In response to the comments received and the statements made at the public hearing, the proposed amendments have been adopted as revised by this Treasury decision.

The amendments to the final regulations contained in this document apply as of July 1, 1991. The amendments to the final regulations under section 61 are contained in § 1.61-21. The amendments to the final regulations under section 132 are contained in § 1.132-6.

Summary of Comments and Explanation of Provisions

1. Interaction of Employer-Provided Transportation Due to Unsafe Conditions Rule and Existing De Minimis Transportation Fare Rules

Numerous commentators requested clarification of the interaction between the new commuting valuation rule and the two employer-provided

transportation fare rules contained in the de minimis fringe benefit regulations under section 132(e) of the Code. Under the first de minimis fringe rule, § 1.132–6(d)(2)(i), the value of local transportation fare is totally excludable from gross income as a de minimis fringe for any employee (regardless of income), if the benefit is reasonable and is provided on an occasional basis because overtime requires an extension of the employee's normal work schedule.

The second de minimis fringe rule, which is contained in § 1.132–6(d)(2)(iii), provides only a partial de minimis exclusion for local transportation furnished to employees for use in commuting to and from work because of unusual circumstances. This exclusion is available only to "noncontrol" employees who are provided local transportation because it is unsafe to use other available means of transportation. The determination of unusual circumstances is made with respect to the employee receiving the transportation and is based on the facts and circumstances. For example, situations in which an employee is asked to work outside his normal work hours or to make a temporary shift change are considered unusual. Factors indicating unsafe conditions are the history of crime in the geographic area surrounding the employee's workplace or residence and the time of day during which the employee must commute. If unusual circumstances and unsafe conditions exist and the employer transports the employee between work and home, the excess of the value of each one-way commute over $1.50 is excludable from the employee's gross income, provided the employee is not a control employee. For 1991, the definition of control employee under § 1.61–21(f)(5) includes officers, directors, one-percent owners, or any employees earning $121,070 or more. For government employees, the definition of control employee under § 1.61–21(f)(6) covers any elected official or any employee earning $101,300 or more.

Unlike the rules of exclusion set forth in § 1.132–6(d)(2) (i) and (iii), the special valuation rule of § 1.61–21(k) does not have an overtime or unusual circumstances work requirement. The new rule applies to situations in which local transportation fare is provided to qualified employees who, under appropriate circumstances, are receiving the benefit, even though their regular working hours have not been extended or changed. The most typical example is the qualified night shift worker who does not work overtime, but is provided transportation to work each evening because of unsafe conditions. The special valuation rule applies if an employee is a "nonexempt" employee subject to the Fair Labor Standards Act of 1938 (as amended), 29 U.S.C. 210–219 (FLSA), earns less than $60,535 in 1991, and receives local transportation to or from work because of security concerns (i.e., at the time of day the employee would ordinarily walk or use public transportation, these forms of commuting would be considered unsafe by a reasonable person). If the rule applies, the excess of the value of each one-way commute over $1.50 is excludable from the employee's gross income.

The absence of an overtime or unusual circumstances work requirement does not mean that the rule is available only to employees who receive the benefit before or after their regular work shifts. The rule may also be used to value transportation provided to employees who work overtime, provided that they otherwise meet the requirements of the regulation. For example, a day-shift employee may frequently work overtime into the evening hours, at which time the employee's usual means of commuting between work and home (i.e., walking or using public transportation) would be considered unsafe. If transportation home is furnished to the employee on more than an occasional basis, the transportation would not be excludable under § 1.132–6(d)(2)(i) as a de minimis fringe. Similarly, if the transportation is provided under circumstances that do not qualify as unusual, the value of the benefits in excess of $1.50 per one-way commute would not be excludable under § 1.132–6(d)(2)(iii). With the implementation of the new rule, the transportation home may be valued at $1.50 per trip, provided the day-shift employee is qualified within the meaning of § 1.61–21(k) and unsafe conditions exist.

Alternative Transportation: Walking or Using Public Transportation

Commentators suggested that the new commuting valuation rule should be expanded to include transportation or transportation fare provided to employees other than those who would otherwise walk or use public transportation to commute to and from work.

The purpose of the new rule is to assist lower-paid non-professionals who would ordinarily walk or use public transportation when commuting, but are unable to do so because of unsafe conditions at the time of day they must commute. Therefore, the rule in the final regulations has not been expanded to cover employees who have other modes of transportation available to them.

It was also suggested that guidance should be given as to how or whether employers should investigate or substantiate the employee's alternative mode of commuting to and from work. In the interest of avoiding unnecessary complexity, the final regulations do not offer additional guidelines, but rely instead on employers' ability to make proper determinations through existing personnel management procedures. To alleviate employer concerns that absolute certainty is required on a day-by-day basis when determining alternative mode of transportation available to the employee, the final regulations provide that the valuation rule is available to employees who would ordinarily walk or use public transportation.

Definition of Employer-Provided Transportation

Several commentators questioned whether the definition of "employer-provided transportation" includes cash reimbursements for transportation paid directly by employees or whether the definition is limited to transportation provided by the employer pursuant to an agreement with an independent taxi or car service company. The most typical example of a cash reimbursement involves the small employer that does not have an account with a car service company, but reimburses qualified employees for cab rides. To address this concern, the final regulations provide that cash reimbursements made by an employer to an employee to cover the cost of purchasing transportation from an unrelated third party (i.e., hiring a cab) will be treated as employer-provided transportation, provided the reimbursement is made under a bona fide reimbursement arrangement.

In addition, commentators inquired as to whether the definition of "employer-provided transportation" includes transportation in an employer-owned or leased vehicle. The requirement that the transportation be purchased from a party that is not related to the employer has not been expanded in the final regulations because the regulations under section 61 of the Code already provide special valuation rules for commuting in employer-provided vehicles. For example, employers desiring to use employer-owned or leased automobiles may rely on the rules relating to employer-provided van-pools and vehicles covered by written "commuting-only" policies. See § 1.61–21(f).

Hourly, Nonexempt Employees

Many commentators requested clarification of the requirement that employees must be "paid on an hourly basis" in order to be qualified. The final regulations provide that if an employee's compensation is stated on an annual basis, the employee may nonetheless be treated as "paid on an hourly basis," provided the employee is not claimed to be exempt from the minimum wage and maximum hour provisions of the FLSA and is paid overtime wages either equal to or exceeding one-and-a-half times the employee's regular hourly rate of pay.

Definition of Compensation

In the interest of consistency, the final regulations modify the proposed regulations to provide that the definition of "compensation" under the new valuation rule is the same as the definition of "compensation" used for purposes of applying the commuting valuation rule of § 1.61–21(f) and the partial de minimis exclusion of § 1.132–6(d)(2)(iii). Thus, an employer relying on any of these three rules must determine compensation in the same manner for all employees.

2. Public Transit Passes

Dollar Increase From $15 to $21

Numerous comments were received that increasing the de minimis exclusion for public transit passes from $15 to $21 was not sufficient to promote use of public transportation. The $15 de minimis exclusion for public transit passes arises out of the legislative history accompanying the Tax Reform Act of 1984, Public Law No. 98–369, section 531, 98 Stat. 494, which added section 132(e) to the Code. Under section 132(e), property or services not otherwise tax-free are excluded from gross income if (after taking into account the frequency with which they are provided) the value of the benefits is so small that accounting for the property or service would be unreasonable or administratively impracticable. The legislative history to the Act specifically lists monthly transit passes provided at a discount not exceeding $15 as an example of a de minimis fringe benefit. H.R. Rep. No. 861, 98th Cong., 2d Sess. 1168 (1984), 1984–3 (Vol. 2) C.B. 422. Increasing the $15 de minimis exclusion for transit passes to $21 to reflect the cost of living furthers the Congressional purpose underlying the directive in the legislative history concerning public transit passes. Thus, the cost-of-living adjustment for public transit passes should not be read as an expansion of the limits otherwise set forth in § 1.132–6 with respect to value or frequency of de minimis fringes.

Reimbursements for Public Transit Commuting Expenses

The final regulations provide that reimbursements made by an employer to an employee after December 31, 1988, to cover the cost of commuting on a public transit system are excludable as de minimis fringes under section 132(e) provided that the employee does not receive more than $21 ($15 for months ending before July 1, 1991) in such reimbursements with respect to commuting costs paid in any given mouth. Under this provision, the reimbursements must be made under a bona fide reimbursement arrangement. In lieu of requiring substantiation each time an employee incurs an expense for commuting on a public transit system, a reimbursement arrangement will be treated as bona fide if the employer establishes appropriate procedures for periodically verifying that the employee's use of public transportation for commuting is consistent with the value of the benefit provided by the employer for that purpose.

The provision allowing for cash reimbursements comports with the legislative clarification in the Senate Finance Committee Report to the Tax Reform Act of 1986, S. Rep. No. 313, 99th Cong., 2d Sess. 1026 (1986). Specifically, the report indicates that the de minimis fringe exclusion includes tokens, vouchers, and reimbursements to cover the costs of commuting by public transit, as long as the amount provided by the employer does not exceed $15 a month ($180 a year). The report also provides that the value of all such transit benefits (including any discounts on passes) furnished to the same individual are aggregated for purposes of determining whether the $15 limit is exceeded. The clarification applies to reimbursements paid after December 31, 1988.

Special Analysis

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations were submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Marianna Dyson, Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.61–1 Through 1.133–1T

Income taxes, Reporting and recordkeeping requirements.

Adoption of the Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended in part by removing the first authority citation for § 1.61–2T et al and by adding the following new citations in numerical order to read as follows:

Authority: Sec. 7805, 68A Stat. 917 (26 U.S.C. 7805) * * * Sec. 1.61–2T also issued under 26 U.S.C. 61; Sec. 1.61–21 also issued under 26 U.S.C. 61 * * * Sections 1.132–0 through 1.132–8T also issued under 26 U.S.C. 132 * * *

Par. 2. Section 1.61–21(k) is added to read as follows:

§ 1.61–21 Taxation of fringe benefits.

* * * * *

(k) *Commuting valuation rule for certain employees*—(1) *In general.* Under the rule of this paragraph (k), the value of the commuting use of employer-provided transportation may be determined under paragraph (k)(3) of this section if the following criteria are met by the employer and employee with respect to the transportation:

(i) The transportation is provided, solely because of unsafe conditions, to an employee who would ordinarily walk or use public transportation for commuting to or from work;

(ii) The employer has established a written policy (e.g., in the employer's personnel manual) under which the transportation is not provided for the employee's personal purposes other than for commuting due to unsafe conditions and the employer's practice in fact corresponds with the policy;

(iii) The transportation is not used for personal purposes other than commuting due to unsafe conditions; and

(iv) The employee receiving the employer-provided transportation is a qualified employee of the employer (as

defined in paragraph (k)(6) of this section).

(2) *Trip-by-trip basis.* The special valuation rule of this paragraph (k) applies on a trip-by-trip basis. If an employer and employee fail to meet the criteria of paragraph (k)(1) of this section with respect to any trip, the value of the transportation for that trip is not determined under paragraph (k)(3) of this section and the amount includible in the employee's income is determined by reference to the fair market value of the transportation.

(3) *Commuting value*—(i) *$1.50 per one-way commute.* If the requirements of this paragraph (k) are satisfied, the value of the commuting use of the employer-provided transportation is $1.50 per one-way commute (i.e., from home to work or from work to home).

(ii) *Value per employee.* If transportation is provided to more than one qualified employee at the same time, the amount includible in the income of each employee is $1.50 per one-way commute.

(4) *Definition of employer-provided transportation.* For purposes of this paragraph (k), "employer-provided transportation" means transportation by vehicle (as defined in paragraph (f)(4) of this section) that is purchased by the employer (or that is purchased by the employee and reimbursed by the employer) from a party that is not related to the employer for the purpose of transporting a qualified employee to or from work. Reimbursements made by an employer to an employee to cover the cost of purchasing transportation (e.g., hiring cabs) must be made under a bona fide reimbursement arrangement.

(5) *Unsafe conditions.* Unsafe conditions exist if a reasonable person would, under the facts and circumstances, consider it unsafe for the employee to walk to or from home, or to walk to or use public transportation at the time of day the employee must commute. One of the factors indicating whether it is unsafe is the history of crime in the geographic area surrounding the employee's workplace or residence at the time of day the employee must commute.

(6) *Qualified employee defined*—(i) *In general.* For purposes of this paragraph (k), a qualified employee is one who meets the following requirements with respect to the employer:

(A) The employee performs services during the current year, is paid on an hourly basis, is not claimed under section 213(a)(1) of the Fair Labor Standards Act of 1938 (as amended), 29 U.S.C. 201–219 (FLSA), to be exempt from the minimum wage and maximum hour provisions of the FLSA, and is within a classification with respect to which the employer actually pays, or has specified in writing that it will pay, compensation for overtime equal to or exceeding one and one-half times the regular rate as provided by section 207 of the FLSA; and

(B) The employee does not receive compensation from the employer in excess of the amount permitted by section 414(q)(1)(C) of the Code.

(ii) *"Compensation" and "paid on an hourly basis" defined.* For purposes of this paragraph (k), "compensation" has the same meaning as in section 414(q)(7). Compensation includes all amounts received from all entities treated as a single employer under section 414 (b), (c), (m), or (o). Levels of compensation shall be adjusted at the same time and in the same manner as provided in section 415(d). If an employee's compensation is stated on an annual basis, the employee is treated as "paid on an hourly basis" for purposes of this paragraph (k) as long as the employee is not claimed to be exempt from the minimum wage and maximum hour provisions of the FLSA and is paid overtime wages either equal to or exceeding one and one-half the employee's regular hourly rate of pay.

(iii) *FLSA compliance required.* An employee will not be considered a qualified employee for purposes of this paragraph (k), unless the employer is in compliance with the recordkeeping requirements concerning that employee's wages, hours, and other conditions and practices of employment as provided in section 211(c) of the FLSA and 29 CFR part 516.

(iv) *Issues arising under the FLSA.* If questions arise concerning an employee's classification under the FLSA, the pronouncements and rulings of the Administrator of the Wage and Hour Division, Department of Labor are determinative.

(v) *Non-qualified employees.* If an employee is not a qualified employee within the meaning of this paragraph (k)(6), no portion of the value of the commuting use of employer-provided transportation is excluded under this paragraph (k).

(7) *Examples.* This paragraph (k) is illustrated by the following examples:

Example 1. A and B are word-processing clerks employed by Y, an accounting firm in a large metropolitan area, and both are qualified employees under paragraph (k)(6) of this section. The normal working hours for A and B are from 11:00 p.m. until 7:00 a.m. and public transportation, the only means of transportation available to A or B, would be considered unsafe by a reasonable person at the time they are required to commute from home to work. In response, Y hires a car service to pick up A and B at their homes each evening for purposes of transporting them to work. The amount includible in the income of both A and B is $1.50 for the one-way commute from home to work.

Example 2. Assume the same facts as in *Example 1*, except that Y also hires a car service to return A and B to their homes each morning at the conclusion of their shifts and public transportation would not be considered unsafe by a reasonable person at the time of day A and B commute to their homes. The value of the commute from work to home is includible in the income of both A and B by reference to fair market value since unsafe conditions do not exist for that trip.

Example 3. C is an associate for Z, a law firm in a metropolitan area. The normal working hours for C's law firm are from 9 a.m. until 6 p.m., but C's ordinary office hours are from 10 a.m. until 8 p.m. Public transportation, the only means of transportation available to C at the time C commutes from work to home during the evening, would be considered unsafe by a reasonable person. In response, Z hires a car service to take C home each evening. C does not receive annual compensation from Z in excess of the amount permitted by section 414(q)(1)(C) of the Code. However, C is treated as an employee exempt from the provisions of the FLSA and, accordingly, is not paid overtime wages. Therefore, C is not a qualified employee within the meaning of paragraph (k)(6) of this section. The value of the commute from work to home is includible in C's income by reference to fair market value.

(8) *Effective date.* This paragraph (k) applies to employer-provided transportation provided to a qualified employee on or after July 1, 1991.

Par. 3. Section 1.132–6 is amended as follows:

1. Paragraph (d)(1) is revised.

2. The second sentence of paragraph (d)(3) is revised.

3. The last sentence of paragraph (d)(4) is revised.

4. The revisions read as follows:

§ 1.132–6 De minimis fringes.

* * * * *

(d) * * *

(1) *Transit Passes.* A public transit pass provided at a discount to defray an employee's commuting costs may be excluded from the employee's gross income as a de minimis fringe if such discount does not exceed $21 in any month. The exclusion provided in this paragraph (d)(1) also applies to the provision of tokens or fare cards that enable an individual to travel on the public transit system if the value of such tokens and fare cards in any month does not exceed by more than $21 the amount the employee paid for the tokens and fare cards for such month. Similarly, the exclusion of this paragraph (d)(1) applies to the provision of a voucher or

similar instruments that is exchangeable solely for tokens, fare cards, or other instruments that enable the employee to use the public transit system if the value of such vouchers and other instruments in any month does not exceed $21. The exclusion of this paragraph (d)(1) also applies to reimbursements made by an employer to an employee after December 31, 1988, to cover the cost of commuting on a public transit system, provided the employee does not receive more than $21 in such reimbursements for commuting costs in any given month. The reimbursement must be made under a bona fide reimbursement arrangement. A reimbursement arrangement will be treated as bona fide if the employer establishes appropriate procedures for verifying on a periodic basis that the employee's use of public transportation for commuting is consistent with the value of the benefit provided by the employer for that purpose. The amount of in-kind public transit commuting benefits and reimbursements provided during any month that are excludible under this paragraph (d)(1) is limited to $21. For months ending before July 1, 1991, the amount is $15 per month. The exclusion provided in this paragraph (d)(1) does not apply to the provision of any benefit to defray public transit expenses incurred for personal travel other than commuting.

* * * * *

(3) * * * For example, the fact that $252 (i.e., $21 per month for 12 months) worth of public transit passes can be excluded from gross income as a de minimis fringe in 1992 does not mean that any fringe benefit with a value equal to or less than $252 may be excluded as a de minimis fringe. * * *

(4) * * * For example, if, in 1992, an employer provides a $50 monthly public transit pass, the entire $50 must be included in income, not just the excess value over $21.

* * * * *

Fred T. Goldberg, Jr.,
Commissioner of Internal Revenue.
Approved: December 18, 1991.
Kenneth W. Gideon,
Assistant Secretary of the Treasury.

[FR Doc. 92-1116 Filed 1-15-92; 8:45 am]
BILLING CODE 4830-01-M

Office of Foreign Assets Control

31 CFR Part 500

Foreign Assets Control Regulations

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Final rule; amendments.

SUMMARY: In support of the implementation of the recently-signed Comprehensive Political Settlement of the Cambodia Conflict, the Treasury Department is lifting prospectively the trade embargo against Cambodia and authorizing new financial and other transactions with Cambodian nationals, the Supreme National Council of Cambodia, its agencies, instrumentalities, and controlled entities, and successor Cambodian governments. This final rule does not unblock the assets within U.S. jurisdiction of the Government of Cambodia or Cambodian nationals blocked as of January 2, 1992, nor does it affect enforcement actions with respect to prior violations of the embargo.

EFFECTIVE DATE: 12:01 a.m. Eastern Standard Time, January 3, 1992.

FOR FURTHER INFORMATION CONTACT: William B. Hoffman, Chief Counsel (tel.: 202/535-6020), or Steven I Pinter, Chief of Licensing (tel.: 202/535-9449), Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220.

SUPPLEMENTARY INFORMATION CONTACT: The Office of Foreign Assets Control ("FAC") is amending the Foreign Assets Control Regulations, 31 CFR part 500 (the "FACR"), to add section 500.570, authorizing new transactions involving property in which Cambodia or its nationals have an interest. The effect of this amendment is that transactions involving such property coming within the jurisdiction of the United States or into the possession or control of persons subject to the jurisdiction of the United States after January 2, 1992, or in which an interest of Cambodia or a national thereof arises after that date, are authorized by general license. Newly authorized transactions include, but are not limited to, importations from and exportations to Cambodia (not otherwise restricted), new investment, travel-related transactions and brokering transactions. Property blocked as of January 2, 1992, because of an interest therein of Cambodia or its nationals, remains blocked.

Because the FACR involve a foreign affairs function, Executive Order 12291 and the provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring notice of proposed rulemaking, opportunity for public participation, and delay in effective date, are inapplicable. Because no notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, does not apply.

For the reasons set forth in the preamble, 31 CFR part 500 is amended as follows:

PART 500—FOREIGN ASSETS CONTROL REGULATIONS

1. The authority citation for part 500 continues to read as follows:

Authority: 50 U.S.C. App. 5, as amended; E.O. 9193, 7 FR 5205, 3 CFR 1938-1943 Cum. Supp., p. 1174; E.O. 9989, 13 FR 4891, 3 CFR 1943-1948 Comp., p. 748.

Subpart E—Licenses, Authorizations and Statements of Licensing Policy

4. Section 500.570 is added to subpart E to read as follows:

§ 500.570 Authorization of new transactions concerning certain Cambodian property.

(a) Transactions involving property in which Cambodia or a national thereof has an interest are authorized where:

(1) The property comes within the jurisdiction of the United States or into the control or possession of a person subject to the jurisdiction of the United States on or after January 3, 1992; or

(2) The interest in the property of Cambodia or a Cambodian national arises on or after January 3, 1992.

(b) Unless otherwise authorized by the Office of Foreign Assets Control, all property and interests in property of Cambodia or its nationals that were blocked pursuant to subpart B of this part as of January 2, 1992, remain blocked and subject to the prohibitions and requirements of this part.

Dated: January 8, 1992.
R. Richard Newcomb,
Director, Office of Foreign Assets Control.
Dated: January 9, 1992.
Peter K. Nunez,
Assistant Secretary (Enforcement).

[FR Doc. 92-1266 Filed 1-14-92; 10:48 am]
BILLING CODE 4810-25-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-4093-6]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of recategorization of sites on the national priorities list.